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No. 91-1355

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. ARON & COMPANY,

Petitioner,

v.

LEO HAVILAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

J. ARON & COMPANY'S REPLY TO BRIEF IN OPPOSITION

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April 24, 1992

Rule 29.1 Statement

The parent company of petitioner J. Aron & Company is The Goldman Sachs Group, L.P. The only subsidiary of J. Aron & Company that is not wholly owned is J. Aron & Company (Singapore) PTE.

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In its decision below, the Second Circuit — the circuit whose decisions have the greatest impact on the U.S. securities industry — directly contravened the Federal Arbitration Act ("FAA") by applying a judge-made "exchange-relatedness" requirement to override the plain language of the arbitration rules of the NYSE (and agreements incorporating those rules). Respondent's protestations notwithstanding, this case is not a fact-bound dispute over the application of the Second Circuit's "exchange-relatedness" limitation on the scope of NYSE arbitration. Rather, it squarely raises the issue of whether the FAA permits courts to create and impose such requirements, thereby contradicting the express terms of arbitration agreements.

The Second Circuit has limited NYSE Rule 600(a), the NYSE arbitration provision governing member-non-member disputes, in a manner contrary not only to the clear meaning

of the rule, but also to common sense. In the Second Circuit's view, an employee is free to litigate employment-related claims against the non-member affiliate of his or her employer, even when those very same claims against the employer must be arbitrated. The Court should correct the Second Circuit's error before substantial public and private resources are unnecessarily wasted on the litigation of disputes that properly belong in NYSE arbitration.

1. The Second Circuit first announced the "exchange-relatedness" requirement in *Paine, Webber, Jackson & Curtis, Inc.* v. *Chase Manhattan Bank, N.A.*, 728 F.2d 577, 580 (2d Cir. 1984), a case predating this Court's recent decisions under the FAA favoring arbitration. *Paine Webber* did not involve, as here, employment-related claims by an officer of an NYSE member firm against his member employer and its non-member affiliate. Instead, in *Paine Webber*, an NYSE member firm brought suit against a non-member bank and one of the bank's employees for making fraudulent representations that led the member firm to extend credit to a third party. In those circumstances, the Second Circuit ignored the language of the NYSE Constitution and Rule 600(a) and limited the rule to "controversies arising out of the member's exchange-related business." *Id.*

In this case, the Second Circuit erred when it expanded the "exchange-relatedness" requirement to cover employment-related claims. That requirement is not found in the text of Rule 600(a), or anywhere else in the NYSE's arbitration rules for that matter, and its application here conflicts directly with the FAA. Indeed, until the decision below, it had been "widely understood in the securities industry" (Brief of the Securities Industry Association as *Amicus Curiae* ("SIA Br.") at 4) that NYSE Rules 347 (governing claims against member firms) and 600(a) (governing claims against non-members)

were coextensive in employment-related cases.[1] By expressly rejecting that consensus view, 947 F.2d at 605 (A20), the Second Circuit created a situation that threatens to increase markedly the burdens on federal and state courts by requiring them to hear the numerous employment-related cases that comprise a substantial portion of the claims before NYSE arbitrators (SIA Br. at 4-5).

2. The FAA was intended to put an end to "centuries of judicial hostility to arbitration agreements," *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), of the sort evinced by the Second Circuit here and in other recent cases requiring action by this Court, *e.g.*, *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987) (reversing Second Circuit's refusal to enforce NYSE arbitration agreement). Courts may not, as the Second Circuit did by imposing the "exchange-relatedness" requirement, "distort the process of contract interpretation . . . in order to ferret out [controversies thought] inappropriate" for arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

Contrary to respondent's claims (Opp. at 11-13), the Second Circuit's decision cannot be reconciled with the strong federal policy mandating enforcement of arbitration agreements "'unless it may be said *with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)) (emphasis added). That is not the case here.

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[1] In a prior case, *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1054 (2d Cir. 1989), the Second Circuit had held — correctly — that a registered representative's employment-related dispute with a non-member affiliate was arbitrable "to the same extent" as his or her dispute with the NYSE member.

Rule 600(a), as Judge Walker wrote in his dissent below, "plainly covers this dispute." 947 F.2d at 608 (A17). It expressly requires arbitration of "[a]ny dispute, claim or controversy" between a non-member, such as petitioner, and an associated person, such as respondent, "arising in connection with the business of such member" or "associated person in connection with his activities as an associated person." (A41). It is not disputed that respondent is an "associated person" or that his employment-related claims against petitioner arose in connection with (a) the business of Goldman, Sachs & Co. ("Goldman Sachs"), and (b) his activities as an associated person, *i.e.*, as a vice president of Goldman Sachs.[2]

3. Respondent treats as irrelevant (Opp. at 14-16) rulings by other courts of appeals that NYSE arbitration rules must be interpreted literally, and that any doubt concerning a rule's scope is resolved in favor of arbitration. *See, e.g.*, *McGinnis* v. *E.F. Hutton & Co.*, 812 F.2d 1011, 1013 (6th Cir.), *cert. denied*, 484 U.S. 824 (1987); *Zolezzi* v. *Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1987); *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923, 937-38 (3d Cir. 1985); *Morgan* v. *Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984). By attempting to distinguish those cases as based on the construction of NYSE Rule 347 instead of Rule 600(a), respondent misses the significance of their holdings for this case: the Second Circuit stands alone in its unwillingness to give effect to the plain language of NYSE arbitration rules.

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[2] Respondent was an "associated person" because he was an officer of Goldman Sachs, an NYSE member firm. *See Fleck*, 891 F.2d at 1054; *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826, 830 (D.C. Cir. 1987). Having voluntarily agreed to arbitrate before the NYSE any dispute with a non-member arising in connection with his activities as a Goldman Sachs officer, petitioner cannot now claim that such an agreement is unfair because he never traded on the NYSE as a registered representative (Opp. at 13).

Further, the Second Circuit's interpretation of the "exchange-relatedness" requirement is itself contrary to that of the D.C. Circuit in *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987).[3] Whereas the Second Circuit held that respondent's employment-related dispute with petitioner is not arbitrable under Rule 600(a) because respondent did not trade on the NYSE, the D.C. Circuit expressly refused to limit Rule 600(a) "to activities involving customer accounts or broker-dealer functions." *Id.* at 831-32. The D.C. Circuit instead held that the employment-related claims of an employee of an NYSE member firm are by definition sufficiently tied to the interests of the NYSE to satisfy the "exchange-relatedness" test and be arbitrable under Rule 600(a). *Id.* at 830. As Judge Walker emphasized below, *Pearce* "require[d the Second Circuit] to hold that Haviland's claims against J. Aron are connected to Haviland's activities as an associated person and thus arbitrable." 947 F.2d at 609 (A20).

4. Respondent minimizes the "substantial national importance to the securities industry" of this petition (SIA Br. at 1), by claiming that it merely involves the "interpretation of a privately enacted rule" (Opp. at 16-17). Once again, respondent is wrong. As rules approved by the Securities and Exchange Commission ("SEC"), NYSE arbitration rules are an integral part of federal regulation of national securities markets.[4] In addition, they are

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[3] In *Pearce*, the D.C. Circuit did not consider the appropriateness of the Second Circuit's "exchange-relatedness" requirement because the non-member affiliate there did not object to its application. 828 F.2d at 831.

[4] Since 1970, Congress has granted the SEC "expansive power to ensure the adequacy of [NYSE] arbitration procedures." *McMahon*, 482 U.S. at 233. Indeed, "[n]o proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with" the Securities Exchange Act of 1934. *Id.* (citing 15 U.S.C. § 78s(b)(2)).

(continued...)

incorporated by reference into many thousands of arbitration agreements throughout the securities industry.

Making much of the fact that Rule 600(a) can be amended (Opp. at 16), respondent ignores that this Court has repeatedly reviewed cases to resolve circuit splits over the proper interpretation of statutes, rules (including SEC and NYSE rules), and regulations, all of which are subject to amendment.[5] More importantly, given the Second Circuit's "exchange-relatedness" requirement, it is hard to see how the NYSE could amend Rule 600(a) to require arbitration of employment-related claims against non-member affiliates, when the present rule already requires arbitration of such claims on its face.

Respondent urges the Court not to expend its resources to hear this case. (Opp. at 3, 17). Yet, the Court's failure to do so will substantially undermine its previous efforts, including just last Term in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), to enforce the FAA's pro-arbitration policy and strengthen NYSE arbitration. Because more than fifty NYSE members, including all of the major

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4 (...continued)
The SEC has "the power, on its own initiative, to 'abrogate, add to, and delete from' any [NYSE] rule if it finds such changes necessary or appropriate to further the objectives of the Act." *Id.* (quoting 15 U.S.C. § 78s(c)).

5 *See, e.g.*, *Martin* v. *Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1175 (1991) (resolving conflict over degree of deference owed to conflicting interpretations of ambiguous regulation under OSHA); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 122 (1989) (resolving conflict between Second and Fifth Circuits over whether Fed. R. Civ. P. 11 permits imposition of sanctions against individual attorney and attorney's law firm); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 230 (1988) (resolving conflict over application of SEC Rule 10b-5 to preliminary corporate merger discussions); *McMahon*, 482 U.S. at 225 (resolving conflict over arbitrability of § 10(b) and RICO claims before NYSE).

firms, have non-member affiliates (*see* A42-A43), the Second Circuit's use of the "exchange-relatedness" test to override the plain language of Rule 600(a) is likely to "result in a substantial — and completely unnecessary — increase in the caseload of federal and state courts as employees increasingly engage in forum shopping" (SIA Br. at 5).

Conclusion

This Court's decisions are clear: the FAA does not permit courts to create additional requirements to circumvent the express terms of arbitration agreements. The Court should therefore grant certiorari and reverse summarily pursuant to Rule 16.1, striking down the Second Circuit's expansion of its "exchange-relatedness" requirement, which sharply limits the arbitration of employment-related claims before the NYSE and thereby subverts one of the Nation's oldest and most respected systems of arbitration.

Respectfully submitted,

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